



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

December 5, 1997

The Honorable Cindy Maria Garner
District Attorney, 349th Judicial District
P.O. Box 1076
Crockett, Texas 75835

Letter Opinion No 97-104.

Re: Whether a person who creates and distributes a do-it-yourself kit for inmates' use in proceedings before the Board of Pardons and Parole is engaged in the unauthorized practice of law (RQ-958)

Dear Ms. Garner:

You ask whether a person who creates and distributes a do-it-yourself kit for inmates' use in proceedings before the Board of Pardons and Paroles (the "board") is engaged in the unauthorized practice of law. You explain that a nonprofit corporation, formed to assist and support Texas Department of Criminal Justice inmates and former inmates, would like to create a do-it-yourself kit to assist inmates and their families in the parole process. The individual who would prepare the material is not an attorney and "[would] not receive compensation for the creation or dissemination of the packet. The individual will show them how to use the kit, but will not act as their representative in front of the parole board."

Government Code section 81.101, subsection (a) defines the "practice of law" to mean

the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

Significantly, subsection (b) of section 81.101 provides as follows:

The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

In the discussion that follows, we examine the statutory language of subsection (a). As we explain below, the determination whether certain conduct constitutes the practice of law will depend

upon the facts. Because this office is not a fact-finding body, it is not possible for us to conclusively determine whether or not certain conduct constitutes the practice of law under subsection (a). Moreover, we caution that subsection (b) “recognize[s] the inherent power of the courts to determine what is the practice of law on a case by case basis, unconfined by statute.” *Unauthorized Practice Comm., State Bar of Tex. v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985). Thus, even if this office had full knowledge of all the relevant facts and could determine whether certain conduct falls within subsection (a), we could not definitively resolve your query given the broad power conferred on the judicial branch by subsection (b).¹

Subsection (a) of section 81.101 embraces both representation of a client in “an action or special proceeding” and “a service rendered out of court.” In your brief, you address the former, arguing that because the board is an administrative agency, its proceedings do not constitute “an action or special proceeding” for purposes of subsection (a).² Your statement of facts indicates, however, that the individual, who will create and distribute the packet and show inmates and their families how to use it, “will not act as their representative in front of the parole board.” Given that the individual will not represent inmates before the board, we believe your emphasis on whether a board proceeding constitutes “an action or special proceeding” for purposes of section 81.101(a) is misplaced. We believe the relevant question is whether the individual at issue would render a service out of court.

As noted above, the subsection (a) definition of “practice of law” embraces “a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.” Gov’t Code § 81.101(a) (emphasis added). Thus, we must consider whether preparation of the proposed kit requires the use of legal skill or knowledge and whether preparation and distribution of the kit is a service.

¹We have been advised by the Texas Department of Criminal Justice Legal Affairs Division that, in its view, the “packet . . . does not constitute the unauthorized practice of law.” Letter from Tomi Rachel Matthews, Assistant General Counsel, Texas Department of Criminal Justice, to Sarah J. Shirley, Office of Texas Attorney General (Oct. 13, 1997). While the views of the department are entitled to some weight in this matter, they are — particularly given the inherent judicial power referred to in section (b) — not dispositive.

²You cite *Carr v. Stringer*, 171 S.W.2d 920 (Tex. Civ. App.—Fort Worth 1943, writ ref’d w.o.m.), for the proposition that representation of another before a nonjudicial, administrative body does not constitute the practice of law. Although we need not resolve whether representation of another before the board constitutes the practice of law, we note that the definition of “practice of law” has been significantly changed since 1943. Addressing nonlawyer representation before two other state agencies, this office noted the change in the law since *Carr* and stated that a “decision concerning the definition of the practice of law should be based upon an analysis of the dangers and benefits to the public [T]hese factors will differ depending on the substance and nature of particular administrative proceedings.” Attorney General Opinion H-974 (1977) at 2; see also Letter Opinion No. 89-78 (1989) at 3 (concluding that attorney general unable to determine whether nonlawyer who appears before Board of Pardons and Paroles practices law given lack of information about services rendered).

With respect to the first issue — whether preparation of the kit would require the use of legal skill or knowledge — we note that Code of Criminal Procedure article 42.18, section 11(b) requires that a person who represents³ an inmate before the board for compensation “must be an attorney licensed in this state.” This suggests that navigating board proceedings requires legal skill. On the other hand, the statute does not require that a person who represents an inmate without compensation be a licensed attorney.⁴ Furthermore, the Texas Department of Criminal Justice has taken the position that the “packet . . . does not constitute the unauthorized practice of law.” See *supra* note 1. The department has also provided this office with a copy of an “inmate do-it-yourself parole kit” that gives inmates step-by-step suggestions for preparing a cover letter and resume to present to the board. Based on our review of that material, we agree with the department that the material’s very general, commonsense information and suggestions do not require the use of legal skill or knowledge. In the final analysis, however, we believe that the determination whether creation of the kit requires the use of legal skill or knowledge not will turn on the nature of the information relayed in the kit alone and thus cannot be resolved as a matter of law. It will also depend on questions of fact, such as the nature of any other services rendered to inmates by the kit’s preparer⁵ and the effect of the kit and any other services on the legal rights of inmates or, in other words, “[t]he character of the service and its relation to the public interest.” *Grievance Comm. of State Bar of Tex., Twenty-first Congressional Dist. v. Dean*, 190 S.W.2d 126, 129 (Tex. Civ. App.—Austin 1945, no writ). Without full knowledge of the facts, we are unable to make this determination. Moreover, as noted above, a definitive determination of this issue is within the sole province of the judiciary. See Gov’t Code § 81.101(b).

Although we believe it is unlikely that a court would conclude that the preparation of a manual like the one provided to us without more requires the use of legal skill or knowledge, we also consider whether preparation and distribution of a kit constitutes a service in order to address two points in your letter. Your analysis suggests that both gratuitous services and the dissemination of information in the form of a kit are excepted from the unauthorized practice of law. For the following reasons, we believe that in Texas one cannot avoid the prohibition against practicing law merely by rendering a service for free or disseminating information in the form of a kit.

First, in this state the practice of law is not limited to services performed for consideration. In 1945, a Texas appellate court, exercising its inherent authority to determine whether services and acts not enumerated in the legislature’s statutory definition constitute the practice of law, held that

³For purposes of Code of Criminal Procedure article 42.18, section 11, “represent” means “to directly or indirectly contact in person or by telephone, facsimile transmission, or correspondence a member or employee of the board or an employee of the department on behalf of an inmate.” Code Crim. Proc. art. 42.18, § 11(m)(3).

⁴See also *Cruz v. Skelton*, 543 F.2d 86, 96 (5th Cir. 1976) (“The informal, unstructured procedures for considering parole application[s] to the to the Texas Board of Parole do not present a forum in which the special analytical, research or forensic skills of the lawyer are necessary, nor even likely to prove particularly helpful”).

⁵You state that kit’s preparer will show inmates how to use the kit. We also note that the kit states that inmate cover letters and resumes should be sent to the kit’s preparer.

gratuitous services may constitute the practice law: "[T]he character of the service and its relation to the public interest[] determines its classification, — not whether compensation be charged therefor." *Dean*, 190 S.W.2d at 129. As the court noted in a companion case,

[T]he reason or purpose of the law [requiring persons practicing law to meet certain qualifications] is not the fact that a fee or consideration may be charged for rendering such legal services. The controlling purpose of all laws, rules and decisions with regard to the licensing of lawyers is to protect the public against persons inexperienced and unlearned in legal matters Wrong legal advice by a layman is equally injurious whether given for or without consideration or compensation.

Grievance Comm. of State Bar of Tex., Twenty-first Congressional Dist. v. Coryell, 190 S.W.2d 130, 131 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.). Thus, "[w]hether compensation is paid to an individual performing services is irrelevant." Attorney General Opinion JM-62 (1983) at 3 (citing *Coryell*, 190 S.W.2d at 130-31).

Second, even more recently, a Texas appellate court held that the publishing, marketing, and distribution of a do-it-yourself will manual is not excepted from the practice of law. *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162, 164 (Tex. Civ. App.—Dallas 1992, writ denied). While courts in other jurisdictions have concluded that lay people who publish, market, and distribute how-to manuals on such subjects as divorce and wills do not practice law provided that they refrain from rendering advice to particular individuals,⁶ the Texas court expressly rejected this approach. *See id.* (declining to follow other jurisdictions in "accept[ing] the new age of legal self-help clinics").⁷

⁶*See, e.g., Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1193-94 (Fla. 1978) (holding that nonlawyers "may sell printed material purporting to explain legal practice and procedure to the public in general" provided that they do not "engage in advising clients as to the various remedies available to them, or otherwise assist them in preparing those forms necessary for a dissolution proceeding"); *State Bar v. Cramer*, 249 N.W.2d 1, 8-9 (Mich. 1976) ("The advertisement and distribution to the general public of forms and documents utilized to obtain a divorce together with any related textual instructions does not constitute the practice of law."); *Oregon State Bar v. Gilchrist*, 538 P.2d 913, 919 (Or. 1975) (advertisement and sale of divorce kits without personal advice to the customer does not constitute the practice of law); *New Jersey State Bar Ass'n v. Divorce Ctr. of Atlantic County*, 477 A.2d 415, 418 (N.J. Super. 1984) ("There is no question . . . that the sale of do-it-yourself kits, even with related textual instructions, is permitted in this State.") (citing New Jersey Supreme Court Comm. on the Unauthorized Practice of Law, Opinion 20, 100 N.J.L.J. 893 (Oct. 6. 1977)).

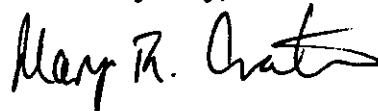
⁷You state that the individual at issue here will show inmates and their families how to use the kit. Thus, even if Texas courts were to accept the view that the publication and distribution of legal self-help information does not constitute the practice of law, the conduct at issue may cross over the line other states' courts have drawn between disseminating information to the general public and advising individuals. *See State Bar v. Cramer*, 249 N.W.2d at 9 (holding that to extent defendant provides personal advice peculiar to dissolution of particular marriage, she is engaged in unauthorized practice of law); *New Jersey State Bar Ass'n v. Divorce Ctr. of Atlantic County*, 477 A.2d at 418-19 ("When the purveyor of a legal kit goes beyond the mere sale of printed material and begins to engage in activity which (continued...)

In summary, this office cannot determine whether a person who creates a do-it-yourself kit for inmates' use in parole proceedings practices law in violation of Government Code section 81.101, because whether a service requires use of legal skill or knowledge will depend upon the facts. In addition, subsection (b) of section 81.101 recognizes the authority of the judicial branch to determine what constitutes the practice of law on a case-by-case basis, unconfined by statute. Thus, even if this office had full knowledge of all the relevant facts and could determine whether certain conduct falls within subsection (a), we could not definitively resolve whether the conduct constitutes the practice of law.

S U M M A R Y

This office cannot determine whether a person who creates a do-it-yourself kit for inmates' use in parole proceedings practices law in violation of Government Code section 81.101. First, whether a service requires use of legal skill or knowledge for purposes of section 81.101, subsection (a) will depend upon the facts. In addition, subsection (b) of section 81.101 recognizes the authority of the judicial branch to determine what constitutes the practice of law on a case-by-case basis, unconfined by statute. Thus, even if this office had full knowledge of all the relevant facts and could determine whether certain conduct falls within subsection (a), this office could not definitively resolve whether the conduct constitutes the practice of law.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

⁷(...continued)

includes explaining or recommending particular forms and making judgments as to how a particular individual should fill them out, that person is engaging in conduct which falls within the traditional definition of the practice of law.")